

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

MICHAEL RODRIGUEZ and JOSE DE SANTOS, on behalf of themselves and all others similarly situated, and on behalf of the general public,

Plaintiffs,

V.

CLEANSOURCE, INC., *et al.*,

Defendants.

Case No. 14-cv-0789-L (DHB)

**ORDER GRANTING/DENYING
DEFENDANTS' MOTION TO
DISMISS [ECF NO. 28]**

Pending before the Court is Defendant's motion to dismiss or strike. (MTD, ECF No. 28.) The motion is fully briefed. (Opp'n, ECF No. 33; Reply, ECF No. 35.) The Court finds this motion suitable for determination on the papers submitted and without oral argument in accordance with Civil Local Rule 7.1(d.1). For the following reasons, the Court **GRANTS IN PART** and **DENIES IN PART** Defendant's motion.

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1 **I. BACKGROUND**

2 According to the Complaint, Plaintiffs Michael Rodriguez (“Rodriguez”) and
 3 Jose De Santos (“De Santos”) “were employed in a non-exempt capacity as an
 4 hourly industrial truck worker, industrial truck driver, industrial vehicle driver,
 5 and/or industrial worker” by Defendant Cleansource, Inc. (“Cleansource”). (Notice
 6 of Removal Att. 2, Ex. A, ¶ 22, ECF No. 1.) Interline Brands, Inc. (“IBI”) purchased
 7 a substantial amount of Cleansource assets. (*Id.* ¶ 17.)

8 On September 25, 2013, Plaintiffs filed a class action complaint pursuant to
 9 Cal. Civ. Proc. Code § 382 against Cleansource in San Diego County Superior
 10 Court on behalf of all current and former drivers employed by Cleansource since
 11 September 25, 2009. Rodriguez and De Santos then filed an amendment to the
 12 complaint on February 5, 2014 to include IBI as a defendant. Plaintiffs allege IBI
 13 violated Cal. Lab. Code §§ 203, 226.7, 512, and 1194; IWC Wage Order No. 9-
 14 2001 subsections (7)(a), (7)(b), and 7(c); Cal. Code Regs. tit. 8, § 11090; and §
 15 17200 of the Cal. Bus. and Prof. Code. (Notice of Removal Att. 2, Ex. A, ¶ 35 (1),
 16 (9), (14), (15), and (16).)

17 Rodriguez and De Santos’ first cause of action seeks compensation for
 18 unpaid wages since they allege IBI has “a continuous policy of clocking-out
 19 Plaintiffs and those similarly situated out for a thirty minute meal period, even
 20 though Plaintiffs and all members of the Class work through their meal periods.”
 21 (*Id.* ¶ 41.)

22 Plaintiffs’ second cause of action concerns Defendant’s failure to pay
 23 overtime “when employees worked over 8 hours a day and when employees worked
 24 over 40 hours a week.” (*Id.* ¶ 48.) They assert that IBI “breached the legal duty to
 25 pay full wages to Plaintiffs by automatically deducting a portion of the wages
 26 earned when Plaintiffs’ and the Class members’ actual time records indicated that
 27 a meal period was not taken.” (*Id.* ¶ 50.)

1 The third cause of action seeks compensation in lieu of Defendant's failure
 2 "to provide 30 minute, uninterrupted meal periods" for every "five continuous work
 3 hours" and "failed to provide an additional 30 minute uninterrupted meal period for
 4 employees on days where they worked in excess of ten hours." (*Id.* ¶¶ 57, 65.)

5 Plaintiffs' fourth cause of action alleges IBI did not allow its employees to
 6 take 10 minute rest periods for every four hours worked and an additional ten
 7 minute rest period when "working in excess of 10 hours a day." (*Id.* ¶¶ 69, 78.)

8 Rodriguez and De Santos allege in the fifth cause of action that Defendant
 9 knowingly and intentionally failed "to itemize in wage statements all deductions
 10 from payment of wages and to accurately report total hours worked by Plaintiffs."
 11 (*Id.* ¶ 83.) They also allege IBI did not "maintain and preserve, in a centralized
 12 location, records showing the hours worked daily by and the wages paid to its
 13 employees." (*Id.* ¶ 84.)

14 Plaintiffs' sixth, seventh, and eighth causes of action concern the wrongful
 15 conversion of wages; fraudulent alteration of De Santos, Rodriguez, and other
 16 employees' wages; and unjust retention of Plaintiffs' and other employees' wages.
 17 (*Id.* ¶¶ 94, 107, 118.)

18 Plaintiffs' ninth cause of action concerns IBI's failure to pay Rodriguez, De
 19 Santos, and the remaining class members "a sum certain at the time of termination
 20 or within seventy-two (72) hours of their resignation, and have failed to pay those
 21 sums for thirty (30) days thereafter." (*Id.* ¶ 128.) Finally, Rodriguez and De Santos
 22 also seek attorneys' fees pursuant to Cal. Lab. Code §§ 218.5, 226(e), and 1194.
 23 (*Id.* ¶ 40.)

24 On April 4, 2014, IBI filed its Notice of Removal asserting that this Court
 25 has jurisdiction under the Class Action Fairness Act ("CAFA"), enacted as 28
 26 U.S.C. § 1332(d). (NOR ¶ 6.) On June 9, 2014, Plaintiffs filed a motion for remand.
 27 (Mot. Remand, ECF No. 13-2.) On August 4, 2014, this Court denied Plaintiffs'
 28 motion for remand. (Order Denying Remand, ECF No. 23.)

1 On August 27, 2014, Defendant filed the instant motion to dismiss or strike.
 2 (Mot. Dismiss, ECF No. 28.) On February 26, 2015, this Court stayed the case
 3 pending resolution of two appeals from potentially controlling Ninth Circuit cases¹.
 4 (Order Granting Stay, ECF No. 53.) On May 27, 2015, upon request of both parties
 5 and after the Supreme Court denied certiorari in the *Dilts* and *Campbell* cases, the
 6 Court lifted the stay. (Order Lifting Stay, ECF No. 58.) The Court now evaluates
 7 Defendant's motion to dismiss or strike.

8

9 **II. LEGAL STANDARD**

10

10 **A. Motion to Dismiss for Failure to State a Claim**

11 The court must dismiss a cause of action for failure to state a claim upon
 12 which relief can be granted. Fed. R. Civ. P. 12(b)(6). A motion to dismiss under
 13 Rule 12(b)(6) tests the legal sufficiency of the complaint. *Navarro v. Block*, 250
 14 F.3d 729, 732 (9th Cir. 2001). The court must accept all allegations of material fact
 15 as true and construe them in light most favorable to the nonmoving party. *Cedars-*
 16 *Sinai Med. Ctr. v. Nat'l League of Postmasters of U.S.*, 497 F.3d 972, 975 (9th Cir.
 17 2007). Material allegations, even if doubtful in fact, are assumed to be true. *Bell*
 18 *Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). However, the court need not
 19 “necessarily assume the truth of legal conclusions merely because they are cast in
 20 the form of factual allegations.” *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d
 21 1136, 1139 (9th Cir. 2003) (internal quotation marks omitted). In fact, the court
 22 does not need to accept any legal conclusions as true. *Ashcroft v. Iqbal*, 556 U.S.
 23 662, 678 (2009).

24 “While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not
 25 need detailed factual allegations, a plaintiff’s obligation to provide the ‘grounds’ of
 26 his ‘entitlement to relief’ requires more than labels and conclusions, and a formulaic
 27

28 ¹ *Dilts v. Penske Logistics LLC*, Ninth Circuit Docket No. 12-55705; *Campbell v. Vitran Express, Inc.*, Ninth Circuit
 Docket No. 12-56250.

recitation of the elements of a cause of action will not do.” *Twombly*, 550 U.S. at 555 (internal citations omitted). Instead, the allegations in the complaint “must be enough to raise a right to relief above the speculative level.” *Id.* Thus, “[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 570). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* “The plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully.” *Id.* A complaint may be dismissed as a matter of law either for lack of a cognizable legal theory or for insufficient facts under a cognizable theory. *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 534 (9th Cir. 1984).

Generally, courts may not consider material outside the complaint when ruling on a motion to dismiss. *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1990). However, documents specifically identified in the complaint whose authenticity is not questioned by parties may also be considered. *Fecht v. Price Co.*, 70 F.3d 1078, 1080 n.1 (9th Cir. 1995) (superseded by statutes on other grounds). Moreover, the court may consider the full text of those documents, even when the complaint quotes only selected portions. *Id.* It may also consider material properly subject to judicial notice without converting the motion into one for summary judgment. *Barron v. Reich*, 13 F.3d 1370, 1377 (9th Cir. 1994).

24 B. Motion to Strike

25 Federal Rule of Civil Procedure 12(f) provides that a court “may strike from
 26 a pleading any insufficient defense or any redundant, immaterial, impertinent, or
 27 scandalous matter.” FED. R. CIV. P. 12(f). Motions to strike are “generally
 28 disfavored because they are often used as delaying tactics and because of the limited

importance of pleadings in federal practice.” *Rosales v. Citibank*, 133 F. Supp. 2d 1177, 1180 (N.D. Cal. 2001). A federal court will not exercise its discretion under Rule 12(f) to strike a pleading unless the matters sought to be omitted have no possible relationship to the controversy, may confuse the issues, or otherwise prejudice a party. *Ollier v. Sweetwater Union High Sch. Dist.*, 735 F. Supp. 2d 1222, 1223 (S.D. Cal. 2010). “Motions to strike generally will not be granted unless it is clear that the matter to be stricken could not have any possible bearing on the subject matter of the litigation.” *In re Facebook PPC Adver. Litig.*, 709 F. Supp. 2d 762, 773 (N.D. Cal. 2010). A court should not strike allegations supplying background or historical material unless it is unduly prejudicial to the opponent. See *LeDuc v. Ky. Cent. Life Ins. Co.*, 814 F. Supp. 820, 830 (N.D. Cal. 1992). When considering a motion to strike, the court “must view the pleadings in a light most favorable to the pleading party.” *In re 2TheMart.com, Inc.*, 114 F. Supp. 2d 955, 965 (C.D. Cal. 2000). Finally, Rule 12(f) “does not authorize a district court to strike a claim for damages on the ground that such damages are precluded as a matter of law.” *Whittlestone, Inc. v. Handi-Craft Co.*, 618 F.3d 970, 971 (9th Cir. 2010).

As noted above, a court may strike a pleading that is: (1) redundant, (2) immaterial, (3) impertinent, or (4) scandalous. Fed. R. Civ. P. 12(f). An “immaterial” matter has no essential or important relationship to the claim for relief or defenses pleaded. *Cal. Dept. of Toxic Substances Control v. ALCO Pac., Inc.*, 217 F. Supp. 2d 1028, 1032 (C.D. Cal. 2002) (internal citations and quotations omitted). An “impertinent” allegation is neither necessary nor relevant to the issues involved in the action. *Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1527 (1993) (rev’d on other grounds). A scandalous pleading is one that “improperly casts a derogatory light on someone, most typically on a party to the action.” *Aoki v. Benihana, Inc.*, 839 F. Supp. 2d 759, 764 (D. Del. 2012).

III. DISCUSSION

1 **A. Request for Judicial Notice**

2 Defendant seeks judicial notice of five documents. (Def.’s RJN, ECF No.
 3 28-2.) Plaintiffs do not oppose. The Court may take notice of facts that are “not
 4 subject to reasonable dispute in that [they are] ... capable of accurate and ready
 5 determination by resort to sources whose accuracy cannot be reasonably
 6 questioned.” Fed. R. Evid. 201(b)(2). Because the documents are either matters of
 7 public record or their accuracy is not subject to reasonable dispute, or both, the
 8 Court **GRANTS** Defendant’s request and takes notice of each of them. *See Reyn’s
 9 Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 n. 6 (9th Cir. 2006).

10 **B. Plaintiffs’ First Cause of Action for “Wage Theft/Time Shaving”**

11 Defendant moves to dismiss Plaintiffs’ first cause of action for “wage
 12 theft/time shaving” because it “is merely a legal *theory* that might support Plaintiffs’
 13 otherwise alleged claim for overtime wages but cannot constitute a separate and
 14 independent cause of action.” (MTD, 3-4.) Further, Defendant claims it is
 15 “impossible to determine what the legal basis for Plaintiffs’ ‘wage theft/time
 16 shaving’ claim is because they fail to allege a statutory basis for the purported claim.
 17 The Court disagrees.

18 It is clear from Plaintiffs’ allegations that they are claiming Defendants failed
 19 to pay them for all hours they worked. Plaintiffs allege that Defendants “have had
 20 a continuous policy of not paying Plaintiffs and those similarly situated for all hours
 21 worked.” (Compl. ¶ 41, ECF No. 1-2.) Plaintiffs further allege that Defendants
 22 clock Plaintiffs out for thirty minute meal periods, even though Plaintiffs work
 23 through their meal periods. (*Id.*) The Complaint goes on to detail exactly how
 24 Plaintiffs allege Defendants manipulated their time sheets. (*Id.* ¶¶ 42-45.) This is
 25 more than sufficient to survive a motion to dismiss.

26 Defendant also suggests that Plaintiffs are required to cite statutory authority
 27 in their Complaint to survive a motion to dismiss. Defendants are
 28 incorrect. Federal pleading rules call for “a short and plain statement of the claim

1 showing that the pleader is entitled to relief,” FED. R. CIV. P. 8(a)(2); they do not
 2 countenance dismissal of a complaint for imperfect statement of the legal theory
 3 supporting the claim asserted. *Johnson v. City of Shelby, Miss.*, 135 S.Ct. 346
 4 (2014). Under *Twombly* and *Iqbal*, a plaintiff must plead facts sufficient to show
 5 that her claim has substantive plausibility, and Plaintiffs’ Complaint is not deficient
 6 in that regard. Plaintiffs’ Complaint clearly presents the facts that they believe
 7 entitle them to relief from Defendants. They are required to do no more to stave off
 8 12(b)(6) dismissal. *Id.* at 347. Defendants’ motion with respect to Plaintiffs’ first
 9 claim is **DENIED**.

10 **C. Plaintiffs’ Second Cause of Action for Failure to Pay Overtime**

11 Defendant argues that Plaintiffs’ overtime claims fail because “Plaintiffs’
 12 hours of service were and are governed by the USDOT regulations and exempt
 13 from California’s overtime laws.” (MTD 4.) Defendant also argues that Plaintiffs’
 14 claims fail under Rule 8 because they “fail to allege any facts regarding, inter alia,
 15 the dates, frequency or hours that they and putative class members worked
 16 overtime.” (MTD 6.)

17 California employers are required to pay employees overtime, unless they are
 18 exempt. *See Cal. Labor Code § 510(a)*. The California Labor Code provides:
 19 “Notwithstanding any agreement to work for a lesser wage, any employee receiving
 20 less than ... the legal overtime compensation applicable to the employee is entitled
 21 to recover in a civil action the unpaid balance of the full amount of this ... overtime
 22 compensation.” Cal. Labor Code § 1194(a). The employer “bear[s] the burden of
 23 proving the affirmative defense of plaintiff’s exemption from overtime.” *Gomez v.*
 24 *Lincare, Inc.*, 173 Cal. App. 4th 508, 515 (2009) (citing *Sav-On Drug Stores, Inc.*
 25 *v. Superior Court*, 34 Cal. 4th 319, 338 (2004)). Therefore, Plaintiffs are not
 26 obligated to plead facts showing that they are not exempt.

27 Section 3(L)(1) of IWC Wage Order No. 9 provides in relevant part:

28 The provisions of this section are not applicable to employees hours
 of service are regulated by (1) The United States Department of

Transportation Code of Federal Regulations, Title 49, Sections 395.1 to 395.13, Hours of Services Drivers . . .

Defendant suggests that each of the Plaintiffs was employed as an “industrial truck driver” and/or an “industrial vehicle driver,” and they thus fall within the scope of this exemption. However, Defendant provide no analysis as to why “industrial truck” or “industrial vehicle” drivers fall within the exemption. Without this analysis, Defendant fails to meet their burden to establish that the exemption applies.

Defendant next argues that Plaintiffs’ allegations for failure to pay overtime are insufficient. According to the Ninth Circuit, “a plaintiff asserting a claim to overtime payments must allege that she worked more than forty hours in a given workweek without being compensated for the overtime hours worked during that workweek².²” *Landers v. Quality Commc’ns, Inc.*, 771 F.3d 638, 644-45 (9th Cir. 2014). “[C]onclusory allegations that merely recite the statutory language are [not] adequate[;];” in order to survive a motion to dismiss the complaint must assert facts about specific periods of time where overtime/regular pay was withheld. *Id.* By way of example, the *Landers* court explained that “[a] plaintiff may establish a plausible claim by estimating the length of her average workweek during the applicable period and the average rate at which she was paid, the amount of overtime wages she believes she is owed, or any other facts that will permit the court to find plausibility.” *Id.* at 645.

Here, Plaintiff has plead that “Defendant failed to pay overtime when employees worked over 8 hours a day and when employees worked over 40 hours a week.” (Compl. ¶ 48.) These type of allegations are precisely the type of allegations that the *Landers* court labeled as insufficient. There are no details plead as to any specific named plaintiff or any specific workday or workweek where a plaintiff worked overtime but was not compensated therefore.

² The *Landers* case is a FLSA case, not a California state law case as is the case here. However, the Ninth Circuit's reasoning in *Landers* applies equally to Plaintiffs' California overtime claims. See *Raphael v. Tesora Refining and Marketing Co. LLC*, No. 2:15-cv-02862-ODW(Ex), 2015 WL 4127905, * 2, n. 3 (C.D. Cal. July 8, 2015).

1 In light of the foregoing, the motion is **GRANTED IN PART WITH LEAVE**
2 **TO AMEND**, to the extent that the second cause of action in the complaint is
3 insufficient under *Landers*.

4

5 **D. Plaintiffs' Third Cause of Action for Failure to Provide Meal
6 Breaks**

7 Defendant moves to dismiss Plaintiffs' third cause of action because it fails to
8 satisfy Rule 8. (MTD 6-7.) Specifically, Defendant claims that Plaintiffs failed to
9 allege "the dates that Plaintiffs and each class member worked more than five or ten
10 hours in a day" and "did not take a first or second meal break." (*Id.* 7.) Defendant
11 also maintains that Plaintiffs failed to allege that the Defendant's meal break
12 practices were applied to each class member that worked at a location where
13 Plaintiffs did not and that the class members were not compensated when they were
14 entitled to but did not take a meal break. (*Id.*) Plaintiffs contend their allegations
15 are sufficient because they alleged that "Defendant's policies of pressuring drivers
16 to stay on route to complete them within rigorous time-frames resulted in
17 unreasonable opportunities to take, and policy-driven incentives to forego, meal
18 periods." (Opp'n 9.) The Court agrees with Plaintiffs.

19 Plaintiffs initially point to Paragraph 65 of their Complaint, but that paragraph
20 is simply a recitation of the elements of the cause of action, and is unsupported by
21 any factual allegations. *Brinker Rest. Corp. v. Superior Court*, 53 Cal. 4th 1004,
22 1040 (2012). If the Complaint stopped here, there would be no doubt that it was
23 insufficient. However, Plaintiffs support these allegations with specific factual
24 allegations that "raise the right to relief above the speculative level," *see Twombly*,
25 at 545, and "permit the court to infer more than the mere possibility of misconduct,"
26 *see Iqbal*, at 679. In particular, Plaintiffs claim that Defendants' business model was
27 based on assigning non-exempt employees too much work that could not be finished
28 in a normal shift, that Plaintiffs feared losing their jobs if they did not complete their

1 work on time, and were thus compelled to skip meal or rest periods. (Compl. ¶¶ 58-
2 63.)

3 In light of the foregoing, the Court **DENIES** Defendant's motion to dismiss
4 the Third Cause of Action.

5

6 **E. Plaintiffs' Fourth Cause of Action for Failure to Provide Rest
7 Periods**

8 Defendant argues that Plaintiffs' rest break claims are devoid of facts and
9 otherwise conclusory. (MTD 9.) Specifically, Defendant suggests that Plaintiffs'
10 Complaint is devoid of factual allegations regarding dates when rest breaks were not
11 taken, routes of drivers who did not take rest breaks, and that such practices were
12 implemented in other locations where the Plaintiffs did not work. (*Id.*) Plaintiffs
13 contend their allegations are sufficient because they "alleged that Defendant did not
14 do the very thing the law requires of it with regard to rest periods – it failed to
15 authorize and permit them." (Opp'n 11-12.) The Court agrees with Plaintiffs.

16 Plaintiffs first point to allegations in their Complaint which essentially amount
17 to a recitation of the elements of their rest period claim. (Opp'n 11 (citing Compl. ¶
18 70).) These allegations, alone, are insufficient. However, Plaintiffs support these
19 allegations with allegations that Defendants "assign[ed] too much work to be
20 completed in too short of time frames, which resulted in Plaintiffs and those similarly
21 situated not breaking route to take meal and rest periods." (Compl. ¶¶ 71-72.) The
22 Complaint goes on to allege that because Defendants value productivity over meal
23 and rest periods, they have implemented policies promoting productivity and
24 encouraging faster route completion times, which leads to missed rest breaks. (*Id.*
25 ¶¶ 72-77.) Such allegations are sufficient at this stage of the proceedings.

26 In light of the foregoing, the Court **DENIES** Defendant's motion to dismiss
27 the Fourth Cause of Action.

28 //

1 **F. Plaintiffs' Fifth Cause of Action for Failure to Provide Accurate
2 Itemized Wage statements and Maintain Accurate Records**

3 **1. California Labor Code § 226**

4 Defendant moves to dismiss the Fifth Cause of Action with respect to
5 Plaintiffs' §226 claims on a number of grounds. First, they suggest that Plaintiffs'
6 claims fail to comply with Rule 8 because they fail to show that Defendant's actions
7 were "knowing and intentional." (MTD 10.) Second, they argue that the Plaintiffs
8 have not alleged an injury. (*Id.* 10-11.) Third, Defendant maintains that "employers
9 are only required to accurately report wages that the employee is actually being paid"
10 and contend that Plaintiffs have not alleged that "the wage statements they received
11 from [Defendant] were inaccurate in reporting the *wages actually paid to them* and
12 the *deductions actually made during the applicable pay period.*" (MTD 11
13 (emphasis in original).) Fourth, Defendant submits that "meal and rest break
14 payments . . . are *not required to be itemized on wage statements.*" (MTD 12
15 (emphasis in original).) Plaintiffs oppose, suggesting that their allegations are
16 sufficient and that Defendant otherwise misstates governing law. (Opp'n 12-16.)

17 Again, Plaintiffs first point to allegations in their Complaint which essentially
18 amount to a recitation of the elements of their wage statements claim. (Opp'n 12
19 (citing Compl. ¶ 83).) These allegations, alone, are insufficient. However, Plaintiffs
20 support these allegations with allegations specifying the specific failures of
21 Defendants with respect to their time records as well as Defendants failure to
22 accurately report the time worked by Plaintiffs. (Compl. ¶ 85.) Such allegations are
23 sufficient at this stage of the proceedings.

24 Plaintiffs next point to the following allegations to show that they have
25 adequately plead an injury with respect to their fifth cause of action:

26 [p]laintiffs and the Class members are informed and believe and
27 thereon allege that as a direct result of the systematic deductions in
28 pay, resulting from application of an automatic computer program and
overtime, Plaintiffs and the Class members have suffered, and continue
to suffer, substantial unpaid wages, and lost interest on such wages...

1 (Opp'n 13 (citing Compl. ¶ 44).) This is insufficient to allege an injury with respect
 2 to this cause of action, as it shows no connection with the alleged wrongdoing in the
 3 Fifth Cause of Action. Plaintiffs refer to additional allegations that may support their
 4 claim, but they do so in their opposition, not in their Complaint. Therefore, this cause
 5 of action is **DISMISSED WITH LEAVE TO AMEND.**

6 The Court notes that Defendant's argument regarding Section 226 is
 7 unpersuasive. "The plain language of the statute belies this erroneous reading:
 8 "Every employer shall ... furnish ... an accurate itemized statement ... showing ...
 9 wages earned [and] total hours worked by the employee'" *Pena v. Taylor Farms*
 10 *Pacific, Inc.*, 13-CV-01282-KJM-AC, 2014 WL 1665231, *8 (E.D. Cal. April 23,
 11 2014) (citing Cal. Lab. Code. §226(a)).

12 Moreover, this Court disagrees with Defendant that "Section 226.7 payments
 13 do not constitute wages for purposes of Section 226(a)." (MTD 13; see III.J.)
 14 Finally, while Defendant may not be required to itemize Section 226.7 payments on
 15 an employee's wage statement, this fact does not eviscerate Plaintiffs' claim.

16 **2. Alleged Violations of California Labor Code §§ 1174 and**
 17 **1175 and IWC Wage Order 9**

18 Defendants next argue that Plaintiffs are not entitled to assert stand-alone
 19 causes of action for violation of Cal. Lab. Code §§ 1174 and IWC Wage Order 9.
 20 (MTD 14-16.) With respect to the IWC Wage Order claim, Defendants suggest "the
 21 only remedy available for a violation of the IWC's Wage orders is an action for civil
 22 penalties under [PAGA]." (*Id.* at 15-16.) Plaintiffs oppose, arguing that a violation
 23 of Sections 226 or 1174 "encompass violations of Wage Order No. 9, and violation
 24 of one is a violation of the other," so their claims are valid. (Opp'n 16-17.) Both
 25 parties cite *Bright v. 99¢ Only Stores*, 189 Cal. App. 4th 1472 (2010), in support of
 26 their argument.

27 In *Bright*, the court found that the plaintiff could state a cause of action for
 28 civil penalties under the Private Attorneys General Act of 2004 for violation of a

1 Wage Order. Specifically, the Court found that violations plaintiff complained of
 2 under Cal. Lab. Code § 1198 were encompassed in Wage Order No. 7. *Id.* at 1477-
 3 78. Therefore, the Court found it was unlawful under the Code to violate the Wage
 4 Order. The last step the Court took was to affirm that the plaintiff could bring a
 5 cause of action under the Wage Order, via the Labor Code, under the civil penalties
 6 provision, Section 2699(f), part of PAGA. So, at least in certain circumstances, a
 7 plaintiff can bring a civil claim, under PAGA, for a violation of a Wage Order. *Id.*
 8 1481.

9 Contrary to Plaintiffs' suggestion, *Bright* does not provide for other penalties
 10 apart from those under PAGA. Because Plaintiffs concede that they do not bring
 11 PAGA claims here, *Bright* provides no basis for their claims under § 1174 and Wage
 12 Order 9. Therefore, these claims are **DISMISSED WITH LEAVE TO AMEND.**

13 G. Plaintiffs' Sixth Cause of Action for Conversion

14 Defendant next argues that Plaintiffs' conversion claim fails because Plaintiffs
 15 are limited to statutory remedies for meal and rest break violations, and in the
 16 alternative, because they fail to comply with Rule 8. (MTD 16, 17.) Plaintiffs
 17 contend that they are entitled to conversion claims and that their claims are otherwise
 18 sufficiently plead. (Opp'n 17-18.) The Court agrees with Plaintiff.

19 This Court notes that other courts have come to different conclusions
 20 regarding whether a plaintiff may state a claim for conversion based on unpaid wages
 21 and overtime. *See, e.g., Green v. Party City Corp.*, No. CV-01-09681 CAS (EX),
 22 2002 WL 553219 (C.D. Cal. Apr. 9, 2002); *Pulido v. Coca-Cola Enters., Inc.*, No.
 23 EDCV06-406VAP(OPX), 2006 WL 1699328 (C.D. Cal. May 25, 2006); *In re Wal-*
 24 *Mart Stores, Inc. Wage & Hour Litig.*, 505 F.Supp.2d 609 (N.D. Cal. 2007); *Vasquez*
 25 *v. Coast Valley Roofing Inc.*, No. CV-F-07-227-OWW-DLB, 2007 WL 1660972
 26 (E.D. Cal. June 6, 2007); *Jacobs v. Genesco, Inc.*, No. CIV. S-08-1666 FCD DAD,
 27 2008 WL 7836412 (E.D. Cal. Sept. 3, 2008). However, this Court finds Judge
 28 Mendez's thorough opinion on the matter persuasive, and agrees that a claim for

1 conversion based on unpaid wages and overtime is viable under California law. *Sims*
2 *v. A T & T Mobility Services LLC*, 955 F. Supp. 2d 1110, 1114-1119 (E.D. Cal. 2013).

3 Defendants assert that even if a conversion claim may lie for unpaid wages,
4 Plaintiffs' claims here fail because "money can only be the subject of an action for
5 conversion if a specific sum capable of identification is involved." (MTD 17.)
6 Plaintiffs fail to oppose, and the Court agrees with Defendants.

7 There are no allegations in the Complaint that the wages sought constitute an
8 identifiable sum or how such a sum can be readily ascertained. "An allegation to
9 that effect is a necessary element of a properly pled conversion claim." *Sims*, 955 F.
10 Supp. at 1121 (citing *PCO, Inc. v. Christensen, Miller, Fink, Jacobs, Glaser, Weil &*
11 *Shapiro, LLP*, 150 Cal. App. 4th 384, 395-96 (2007)). Plaintiffs' conversion claim is
12 therefore improperly plead.

13 In light of the foregoing, the conversion claim is **DISMISSED WITH**
14 **LEAVE TO AMEND.**

15 **H. Plaintiffs' Seventh Cause of Action for Fraud**

16 Defendants' unopposed motion to dismiss Plaintiffs' fraud claims is
17 **GRANTED** and Plaintiffs' Seventh Cause of Action is **DISMISSED WITH**
18 **PREJUDICE.**

19 **I. Plaintiffs' Eighth Cause of Action for Unjust Enrichment**

20 Defendant moves to dismiss Plaintiffs' unjust enrichment claims because
21 "[t]here is no cause of action in California for unjust enrichment." (MTD 18 (citing
22 *Melchior v. New Line Prods. Inc.*, 106 Cal. App. 4th 779, 794 (2003). Plaintiffs
23 oppose, but fail to distinguish the authority presented by Defendant. (Opp'n 18.)
24 Instead, they appear to limit their opposition to showing that they have alleged the
25 elements of an unjust enrichment claim.

26 In California, "there is a division in the law" on the question
27 of unjust enrichment. *Mohebbi v. Khazen*, 50 F.Supp.3d 1234, 1260 (N.D. Cal.
28 2014). Courts have found both a cause of action for unjust enrichment, and

1 not. *Ghirardo v. Antonioli*, 14 Cal. 4th 39 (1996) (allowing recovery
 2 for unjust enrichment); *In re Toyota Motor Corp. Unintended Acceleration Mktg.,*
 3 *Sales Practices, & Products Liab. Litig.*, 754 F.Supp.2d 1145, 1194 (C.D. Cal.
 4 2010) (“Simply put, there is no cause of action in California for unjust enrichment.”)
 5 (internal quotations and citations omitted); *McCullough v. Lennar Corp.*, No.
 6 09cv1808-WQH-NLS, 2009 WL 3805305 (S.D. Cal. Nov. 10, 2009). Given this
 7 conflict, the Court declines to conclude that this claim is legally incognizable.
 8 Therefore, Defendant’s motion to dismiss this claim is **DENIED** on this ground.

9 “The elements of unjust enrichment are ‘receipt of a benefit and unjust
 10 retention of the benefit at the expense of another.’” *Berger v. Home Depot USA,*
 11 *Inc.*, 741 F.3d 1061, 1070 (9th Cir. 2014) (quoting *Lectrodryer v. SeoulBank*, 77
 12 Cal.App.4th 723, 726, (2000)). Plaintiffs’ Complaint plausibly alleges the first
 13 element, Defendant’s receipt of a benefit. (Compl. ¶ 119) (“At all times mentioned
 14 herein, Defendants and/or DOES were in receipt of wages and/or monies which
 15 belonged to Plaintiffs and those similarly situated.”) Plaintiffs’ Complaint also
 16 plausibly alleges the second element, Defendant’s unjust retention of the financial
 17 benefit at the expense of the purchasers. (*Id.* ¶¶ 118) (“At all times mentioned herein,
 18 there was an unjust retention of Plaintiffs’ and others similarly situated’s wages.”)

19 In light of the foregoing, the Court **DENIES** Defendant’s motion to dismiss
 20 the unjust enrichment claim.

21 **J. Plaintiffs’ Ninth Cause of Action for Waiting Time Penalties**

22 Defendant moves to dismiss Plaintiffs’ Cal. Labor Code § 203 claims for
 23 failure to satisfy Rule 8. (MTD 18.) Alternatively, Defendant argues that this cause
 24 of action fails because “Section 226.7 payments do not constitute ‘wages earned’
 25 under Cal. Labor Code § 201 for purposes of incurring waiting time penalties under
 26 Section 203.” (*Id.* 21.)

27 California Labor Code Section 203 imposes so-called “waiting time” penalties
 28 for failure to timely pay wages upon termination of employment, allowing the

1 employee to continue to accrue wages “from the due date thereof” for up to 30 days
 2 “until paid or until an action therefor is commenced.” Cal. Lab. Code § 203(a).
 3 Penalties are assigned where an employer “*willfully* fails to pay.” *Id.* (emphasis
 4 added). The meaning of “willful” under ¶ 203 “is that an employer has intentionally
 5 failed or refused to perform an act which was required to be done.” *See Amaral v.*
 6 *Cintas Corp.* No. 2, 163 Cal. App. 4th 1157, 1201 (2008). “[T]he employer’s refusal
 7 to pay need not be based on a deliberate evil purpose to defraud workmen of wages
 8 which the employer knows to be due.” *Id.* (citation and quotation omitted). Upon
 9 discharge, the employee’s earned and unpaid wages are due within 72 hours. *Id.* §
 10 201(a).

11 Here, Plaintiffs have sufficiently plead a willful violation of Section 203.
 12 First, Plaintiffs plead the elements of a willful Section 203 violation. (Compl. ¶¶
 13 126-128.) When read with previous allegations in the Complaint regarding
 14 companywide policies of “dinging,” “shaving,” and “scrubbing” and other nefarious
 15 behavior, these allegations are sufficient to state a plausible claim under Rule 8.
 16 (Compl. 43.)

17 Defendant’s argument with respect to Section 226.7 has already been made
 18 and rejected. *Pena v. Taylor Farms Pacific, Inc.*, 13-CV-01282-KJM-AC, 2014 WL
 19 1665231, *8 (E.D. Cal. April 23, 2014). Defendant points out that this case is not
 20 binding on this Court, and the Court agrees. However, Judge Mueller’s analysis of
 21 the argument, based on controlling Supreme Court authority, persuades this Court
 22 that Defendant’s argument fails.

23 In light of the foregoing, the Court **DENIES** Defendant’s motion to dismiss
 24 the Ninth Cause of Action.

25 **K. Plaintiffs’ Tenth Cause of Action for Violation of the UCL**

26 Defendant next moves to dismiss Plaintiffs’ OCL claims because they fail to
 27 meet Rule 8 standards because they are based on insufficiently plead causes of action
 28 and because Section 226.7 payments are not subject to restitution under the UCL.

1 (MTD 22.) Defendant's Rule 8 argument fails because numerous claims have
 2 survived the motion to dismiss. Defendant's Section 226.7 again fails, as detailed in
 3 *Pena*. 2014 WL 1665231, at *10 (holding that payments under 226.7 are properly
 4 characterized as restitution).

5 In light of the foregoing, the Court **DENIES** Defendant's motion to dismiss
 6 the Tenth Cause of Action.

7 **L. Plaintiffs' Claims for Injunctive Relief**

8 Defendants move to dismiss Plaintiffs' claims for injunctive relief because
 9 they cannot establish that they will suffer future harm. Specifically, Defendants
 10 suggest that former employees lack standing to request injunctive relief on a putative
 11 class containing former and current employees. (MTD 23.) The Court agrees.

12 The Court finds that plaintiffs lack standing to seek prospective relief under
 13 the UCL because they do not dispute that they are no longer employees of Defendant,
 14 and thus, they cannot demonstrate "a real or immediate threat of irreparable injury"
 15 by defendant's employment practices. *See e.g., Heffelfinger v. Elec. Data Sys.*
 16 *Corp.*, 2008 WL 8128621, *17 (C.D. Cal. Jan. 7, 2008) ("Because plaintiffs are no
 17 longer employed by EDS, they lack standing to seek prospective injunctive relief
 18 under the UCL."); *Milligan v. Am. Airlines, Inc.*, 327 Fed. Appx. 694, 696 (9th Cir.
 19 2009); *Clark v. City of Lakewood*, 259 F.3d 996, 1007 (9th Cir.2001) ("In the context
 20 of injunctive relief, plaintiff must demonstrate a real or immediate threat of an
 21 irreparable injury.").

22 In light of the foregoing, the Court **GRANTS** Defendant's motion to dismiss
 23 Plaintiffs' injunctive relief claims and **DISMISSES** them **WITH PREJUDICE**.

24 **M. Plaintiffs' Request for Punitive and Exemplary Damages**

25 Defendants move to dismiss Plaintiffs' request for punitive and exemplary
 26 damages, and Plaintiffs suggest that they do not seek such damages. However, their
 27 Complaint does seek "punitive and exemplary damages." (Compl. ¶¶ 44.) Because
 28 Plaintiffs effectively concede that they will not seek such damages and otherwise fail

to oppose the motion, Plaintiffs' claims for punitive and exemplary damages are
DISMISSED WITH PREJUDICE.

N. Plaintiffs' Request for Attorneys' Fees in Connection with Meal and Rest Break Claims

Defendant's next argue that Plaintiffs' request for attorneys' fees are improper under *Kirby v. Immoos Fire Protection, Inc.*, 52 Cal. 4th 1244 (2012). However, numerous courts have held to the contrary, finding attorneys' fees appropriate under Cal. Civ. P. Code. § 1021.5. *Pena*, 2014 WL 1665231, at *11 (collecting cases). Therefore, the motion is **DENIED**.

O. Plaintiffs' Section 226 Request

Lastly, Defendants move to dismiss Plaintiffs' requests for "recovery of [premium wages], plus interest and penalties thereon, attorneys' fees and costs, under Labor Code section 226." (MTD 25 (paraphrasing Compl. ¶¶ 67, 80.) Specifically, Defendant argues that Section 226 "does not provide for recovery of any remedies for such claims." (MTD 25.) However, Defendant points to no authority to support this position. Moreover, Plaintiff provides authority to the contrary. (Opp'n 25 (citing Cal Lab. Code §§ 218.5, 218.6, 226.3).) Therefore, the motion is **DENIED**.

IV. CONCLUSION

In light of the foregoing, Defendant's motion to dismiss or strike is **GRANTED IN PART** and **DENIED IN PART**, as detailed above. Plaintiffs shall file their amended Complaint on or before **August 28, 2015**.

IT IS SO ORDERED.

DATED: August 19, 2015


M. James Lorenz
United States District Judge